

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New England Power Generators Association, Inc.,)	
)	
)	
Complainant,)	
)	
v.)	Docket No. EL15-_____ -000
)	
ISO New England Inc.,)	
)	
Respondent.)	

**COMPLAINT REQUESTING FAST TRACK PROCESSING OF
THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Sections 206 and 306 of the Federal Power Act (the “FPA”)¹ and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),² the New England Power Generators Association, Inc. (“NEPGA”) submits this complaint (this “Complaint”) requesting that the Commission direct ISO New England Inc. (“ISO-NE”) to disqualify Demand Response Capacity Resources³ from participating as supply in the Forward Capacity Auction (“FCA”) for the 2018/2019 Capacity Commitment Period (“FCA 9”) and to revise its Tariff to exclude such resources from participating as supply in the Forward Capacity Market (“FCM”) going forward. Such action is required in light of the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) in *Electric Power Supply Association v. FERC*.⁴

¹ 16 U.S.C. §§ 824e, 825e (2012).

² 18 C.F.R. § 385.206 (2014).

³ This and other capitalized terms not otherwise defined herein have the meaning set forth in the ISO-NE Transmission, Markets & Services Tariff (the “Tariff”).

⁴ 753 F.3d 216 (D.C. Cir. 2014) (“EPSA”).

In *EPSA*, the D.C. Circuit held that the Commission lacks jurisdiction under the FPA to regulate rates for demand response.⁵ Although decided in the context of a rulemaking concerning demand response participation in organized wholesale energy markets, the reasoning of the D.C. Circuit's decision applies equally to FCM and other wholesale markets, and compels the conclusion that Demand Response Capacity Resources cannot lawfully participate as supply in FCA 9 or other FCM auctions. Even assuming *arguendo* that there were some reasonable basis for interpreting *EPSA* as being limited to the energy markets, however, Demand Response Capacity Resources would still need to be disqualified from supply-side participation in FCA 9, because those resources will be unable to fulfill their obligations to submit offers into the Day-Ahead and Real-Time Energy Markets if they clear and assume Capacity Supply Obligations.

NEPGA respectfully requests that the Commission grant this Complaint ***on or before January 15, 2015*** in order to address this issue before the scheduled commencement of FCA 9 on February 2, 2015.⁶ Addressing this issue in advance of FCA 9 will ensure that clearing prices are not distorted by the participation of resources that cannot lawfully participate in that auction and that will be unable to fulfill their obligations if selected. It will also help avoid the challenges of attempting to unwind their Capacity Supply Obligations after the auction.

⁵ See *id.* at 220-24.

⁶ See ISO-NE, *Master Forward Capacity Auction #9 Schedule* (revised July 10, 2014), available at http://www.iso-ne.com/static-assets/documents/markets/othrmkts_data/fcm/auction_cal/2018_2019_master_frwd_cap_auction_9_update_7_10_2014.pdf.

I.

CORRESPONDENCE AND COMMUNICATIONS

NEPGA respectfully requests that all correspondence and communications concerning the above-captioned proceeding be addressed to the following persons, who should be placed on the Commission's official service list in this proceeding:⁷

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II.

DESCRIPTION OF COMPLAINANT AND RESPONDENT

A. NEPGA

NEPGA, a non-profit entity duly organized and existing under the laws of the Commonwealth of Massachusetts, is a trade organization that advocates for the business interests of non-utility electric power generators in New England. NEPGA's member companies

⁷ NEPGA respectfully requests waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.203(b)(3) (2014), to the extent necessary to permit more than two persons to be included on the official service list on its behalf in this proceeding.

represent approximately 26,000 MW of electrical generating capacity throughout the New England region.⁸

B. ISO-NE

ISO-NE is the private, non-profit entity that serves as the regional transmission organization (“RTO”) for New England. ISO-NE operates the New England bulk power system and administers New England’s organized wholesale electricity markets, including FCM, pursuant to the Tariff. As an RTO, ISO-NE has the responsibility to protect the short-term reliability of the New England Control Area and to operate the system according to reliability standards established by the Northeast Power Coordinating Council, Inc. and the North American Electric Reliability Corporation.

III.

BACKGROUND

A. The *EPSA* Decision

In *EPSA*, the D.C. Circuit vacated the Commission’s Order No. 745,⁹ which required RTOs and independent system operators to pay demand response providers for energy at the full locational marginal price, with no offset for the avoided cost of retail energy purchases.¹⁰ The D.C. Circuit vacated the rule on the grounds that the Commission had exceeded its jurisdiction

⁸ The positions set forth in this filing represent the position of NEPGA as an organization, but not necessarily the views of any particular member with respect to any issue.

⁹ *Demand Response Comp. in Organized Wholesale Energy Mkts.*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (“Order No. 745”), *on reh’g & clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated & remanded*, *EPSA*, 753 F.3d 216.

¹⁰ See *EPSA*, 753 F.3d at 219-20.

by attempting to regulate the retail market¹¹ and had acted arbitrarily and capriciously by failing to address serious objections to its compensation scheme.¹²

In finding that the Commission exceeded its jurisdiction, the D.C. Circuit held that the Commission lacks jurisdiction to regulate compensation for “demand response.”¹³ Noting that the Commission’s regulations set forth just a “single definition of ‘demand response,’”¹⁴ the court rejected the notion that reductions in consumption can be considered “wholesale” and thus subject to the Commission’s jurisdiction.¹⁵ The D.C. Circuit held that “[d]emand response - simply put - is part of the retail market. It involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption.”¹⁶ While the Commission enjoys broad discretion to regulate “practices affecting the wholesale market,” the D.C. Circuit explained, it may “not directly regulat[e] a matter subject to state control, such as the retail market.”¹⁷

On September 17, 2014, the D.C. Circuit denied requests for rehearing *en banc* of the EPSC decision.¹⁸ On October 20, 2014, the D.C. Circuit granted the Commission’s request for stay of the issuance of the mandate through December 16, 2014, pending the government’s

¹¹ See *id.* at 220-24.

¹² See *id.* at 224-25.

¹³ See *id.* at 220.

¹⁴ *Id.* (citing 18 C.F.R. § 35.28(b)(4) (2012)).

¹⁵ See *id.* at 220-24.

¹⁶ *Id.* at 223 (emphasis in original).

¹⁷ *Id.* at 222. See also *id.* at 224 (“Because [Order No. 745] entails direct regulation of the retail market – a matter exclusively within state control – it exceeds the Commission’s authority.”).

¹⁸ See *Electric Power Supply Ass’n v. FERC*, Nos. 11-1486, *et al.* (D.C. Cir. Sept. 17, 2014) (*per curiam*) (order denying the Commission’s petition for rehearing *en banc*); *Electric Power Supply Ass’n v. FERC*, Nos. 11-1486, *et al.* (D.C. Cir. Sept. 17, 2014) (*per curiam*) (order denying other petitions for rehearing *en banc*).

consideration of whether to file a petition for writ of *certiorari*, but denied a similar request by various intervenors.¹⁹

B. Participation Of Demand Response Capacity Resources In FCM

Demand Response Capacity Resources are currently deemed eligible to participate as supply in FCM under ISO-NE’s Tariff.²⁰ A Demand Response Capacity Resource is a resource comprised of one or more Demand Response Assets²¹ that meets certain registration requirements and participates in an FCA.²² A “Demand Response Asset” is defined as “the electricity consumption of an individual end-use customer at a Retail Delivery Point or the aggregated electricity consumption of multiple end use customers from multiple delivery points that meets the registration requirements in Section III.E2.2.”²³

A Demand Response Capacity Resource that clears in an FCA and acquires a Capacity Supply Obligation is subject to an energy must-offer requirement similar to that which applies to Generating Capacity Resources. Specifically, the Tariff provides:

A Demand Response Capacity Resource having a Capacity Supply Obligation shall submit Demand Reduction Offers through its Demand Response Resources and submit Supply Offers of any associated Net Supply Generator Assets, into both the Day-Ahead Energy Market and Real-Time Energy Market through its Demand Response Resources and associated Net Supply Generator Assets. The sum of the Demand Reduction Offers and Supply Offers must be equal to or greater than the Demand Response Capacity

¹⁹ See *Electric Power Supply Ass’n v. FERC*, Nos. 11-1486, et al. (D.C. Cir. Oct. 20, 2014) (*per curiam*) (the “October 20 Order”).

²⁰ Demand Response Capacity Resources are among the “Demand Resources” deemed eligible to participate in an FCA. See Tariff, § III.13.1.4.1.

²¹ The term “Demand Response Capacity Resource” is defined by reference to the defined term “Demand Response Resource,” which is, in turn, defined by reference to the term “Demand Response Asset.” See *id.*, § I.2.2 (definitions of “Demand Response Capacity Resource,” “Demand Response Resource” and “Demand Response Asset”).

²² See *id.*

²³ *Id.*

Resource’s Capacity Supply Obligation whenever the Demand Response Resources and associated Net Supply Generator Assets are physically available.²⁴

This must-offer requirement was adopted to “help[] ensure just and reasonable and not unduly discriminatory or preferential rates by providing for more efficient, economic dispatch of all supply resources.”²⁵

IV.

COMPLAINT

As discussed below, the reasoning of the *EPSA* decision compels the disqualification of Demand Response Capacity Resources from FCA 9 and their exclusion from subsequent FCM auctions. Moreover, even if there were some reasonable basis for interpreting that decision as limited to demand response participation in wholesale energy markets, Demand Response Capacity Resources must still be excluded from participating as supply in FCA 9 and other FCM auctions based on their inability to fulfill their energy must-offer obligations.²⁶ Either way, allowing Demand Response Capacity Resources to participate as supply in FCM auctions would be “inconsistent with the core principles of the FCM Rules,” as it would “lead to the inclusion of capacity resources in the FCA that consumers would pay for, but from which they would receive no benefits . . .”²⁷

²⁴ *Id.*, § III.13.6.1.5.1.

²⁵ *ISO New England Inc.*, 142 FERC ¶ 61,027 at P 27 (2013).

²⁶ This Complaint is directed solely at the participation of Demand Response Capacity Resources in FCA 9 and subsequent FCM auctions, and NEPGA is not, at this time, challenging the participation of other Demand Resources in FCM.

²⁷ *ISO New England Inc.*, 122 FERC ¶ 61,018 at P 53 (2008). *See also id.* at P 50 (finding that even if ISO-NE violated its Tariff in not qualifying certain resources for the first FCA, it would be inappropriate to re-run the analysis when doing so would “result in the inclusion of resources in the FCA that are incapable of providing incremental capacity to the system”).

A. The *EPSA* Decision Applies With Equal Force To Demand Response Participation In Wholesale Capacity Markets

While Order No. 745 involved demand response participation in wholesale energy markets,²⁸ the reasoning of the D.C. Circuit’s jurisdictional holding in *EPSA* was not so limited. To the contrary, the D.C. Circuit found that the Commission lacks jurisdiction to regulate compensation for “demand response,” as that term is defined in the Commission’s regulations.²⁹ In other words, the Commission has no statutory authority to regulate compensation for “reduction[s] in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.”³⁰ Regardless of whether such compensation is provided through the wholesale energy markets or FCM, the Commission is doing exactly what the D.C. Circuit found to be prohibited when it allows Demand Response Capacity Resources – which represent “the electricity consumption of an individual end-use customer at a Retail Delivery Point or the aggregated electricity consumption of multiple end use customers”³¹ – to participate in the wholesale markets administered by ISO-NE. However one slices it, the payments are still for something that “involves *retail* customers, their decisions whether to purchase *at retail*, and their levels of *retail* electricity consumption.”³²

Tellingly, at no point in its jurisdictional analysis did the D.C. Circuit make specific reference to demand response participation in wholesale *energy* markets, as distinct from other wholesale power markets. Rather, after first observing that the Commission lacked jurisdiction

²⁸ See Order No. 745, FERC Stats. & Regs. ¶ 31,322 at P 85 (stating that Order No. 745 “is focused only on organized wholesale energy markets, not capacity markets”).

²⁹ See *EPSA*, 753 F.3d at 220 (citing 18 C.F.R. § 35.28(b)(4) (2012)).

³⁰ 18 C.F.R. § 35.28(b)(4) (2014).

³¹ Tariff, § I.2.2 (definition of “Demand Response Asset”).

³² *EPSA*, 753 F.3d at 223 (emphasis in original).

to regulate demand response under Section 201 of the FPA,³³ the D.C. Circuit focused on the Commission’s assertion of jurisdiction over demand response under Sections 205 and 206 of the FPA³⁴ on the theory that “it ‘directly affects wholesale rates.’”³⁵ Examining “the overall statutory scheme” of the FPA, the Court found that “[t]he broad ‘affecting’ language of §§ 205 and 206 does not erase the specific limits of § 201,”³⁶ and thus that the Commission’s “affecting” jurisdiction does not extend to “a matter subject to state control, such as the retail market.”³⁷ It is simply untenable to suggest that there is some jurisdictional distinction between “compensat[ing] a consumer for reducing demand”³⁸ in the energy market and doing precisely the same thing in the capacity market. The limitations imposed by Section 201 of the FPA³⁹ are the exactly same in either case.

The notion that the Commission would possess broader jurisdiction over demand response when it participates as supply in the capacity markets also ignores the fact that the FPA says nothing about electric capacity, as such. Instead, the Commission’s jurisdiction over capacity is entirely derivative of its jurisdiction over “the sale of electric *energy* at wholesale in interstate commerce”⁴⁰ As the Commission is a “creature of statute” that only has authority

³³ 16 U.S.C. § 824 (2012). The court said it was “astute[]” of the Commission not to have asserted jurisdiction under Section 201 of the FPA, because “demand response is not a wholesale sale of electricity; in fact, it is not a sale at all.” *EPSA*, 753 F.3d at 221. *See also id.* at 223 (“A buyer is a buyer, but a reduction in consumption cannot be a ‘wholesale sale.’”).

³⁴ 16 U.S.C. §§ 824d, 824e (2012).

³⁵ *EPSA*, 753 F.3d at 221.

³⁶ *Id.* (citations omitted).

³⁷ *Id.*

³⁸ *Id.* at 223.

³⁹ 16 U.S.C. § 824 (2012).

⁴⁰ 16 U.S.C. § 824(b)(1) (2012) (emphasis added). *See Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 483-85 (D.C. Cir. 2009); *Mississippi Indus. v. FERC*, 808 F.2d 1525, 1539-43 (D.C. Cir. 1987), vacated in part on other grounds, 822 F.2d 1104 (D.C. Cir. 1987) (*per curiam*); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1301-03 (D.C. Cir. 1978).

expressly conferred upon it by Congress,⁴¹ it is hard to imagine how the Commission could be said to have greater jurisdiction over demand response in wholesale capacity markets than over demand response in wholesale energy markets, when its jurisdiction over both markets is grounded in the same statutory grant of jurisdiction over electric energy.

Under any reasonable reading of *EPSA*, the Commission lacks jurisdiction to allow Demand Response Capacity Resources to participate in, and be compensated through, FCM. This renders the participation of such resources in FCA 9 and other FCM auctions unlawful, and will cause the resulting clearing prices to be unjust and unreasonable inasmuch as they will be artificially suppressed by the inclusion of resources that cannot lawfully provide capacity during the relevant Capacity Commitment Period.

B. Even Assuming *Arguendo* That *EPSA* Could Reasonably Be Construed As Being Limited To Energy Markets, Demand Response Capacity Resources Must Still Be Excluded From FCM In Light Of Their Inability To Fulfill Their Energy Must-Offer Obligations

Even assuming *arguendo* that there were some basis for claiming that *EPSA*'s jurisdictional holding was limited to energy markets, Demand Response Capacity Resources must still be excluded from participating as supply in FCA 9 and subsequent FCM auctions in light of their inability to fulfill their energy must-offer obligations. The Tariff requires that Demand Response Capacity Resources submit offers into ISO-NE's Day-Ahead and Real-Time Energy Markets,⁴² and even if the *EPSA* decision was limited to demand response participation in energy markets, that decision will indisputably prevent them from doing so. Indeed, in the context of a proposal by PJM Interconnection, L.L.C. ("PJM") to implement a similar must-offer requirement for demand response resources, demand response providers conceded that they

⁴¹ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

⁴² See Tariff, § III.13.6.1.5.1.

“may not be permitted legally to comply with a day-ahead energy market must-offer obligation, even if [demand response] participation as a capacity resource is not addressed or impacted by the [EPSA] [d]ecision.”⁴³

The fact that Demand Response Capacity Resources will be unable to fulfill their energy market participation obligations cannot be brushed aside as some minor, technical impediment to their assuming Capacity Supply Obligations. Rather, as both ISO-NE and the Commission have emphasized on any number of occasions, the obligation to be available to provide energy goes to the heart of what it means to assume a Capacity Supply Obligation. For example, the Commission has stated that “a Capacity Supply Obligation represents a resource owner’s assurance that the resource will be available to supply capacity and energy three years in the future.”⁴⁴ This is equally true of Generating Capacity Resources and Demand Response Capacity Resources, as reflected by the fact that both are subject to energy must-offer requirements.⁴⁵ As ISO-NE explained in proposing the must-offer requirement for Demand Response Capacity Resources: “The energy market participation requirement is the mechanism

⁴³ Comments of the PJM Industrial Customer Coalition On PJM’s Capacity Performance Proposal at 4 (Sept. 17, 2014), *available at* <http://www.pjm.com/~/media/committees-groups/committees/elc/comments/the-pjm-industrial-customer-coalition-comments-on-pjm-capacity-performance-proposal.ashx>.

⁴⁴ *New England Power Generators Ass’n, Inc. v. ISO New England Inc.*, 144 FERC ¶ 61,157 at P 2, *on reh’g*, 145 FERC ¶ 61,206 (2013). See also *New England Power Generators Ass’n, Inc. v. FERC*, 757 F.3d 283, 286 (D.C. Cir. 2014) (equating “capacity” to “energy available for later use”).

⁴⁵ See Tariff, § III.13.6.1.1.1 (“A Generating Capacity Resource having a Capacity Supply Obligation shall be offered into both the Day-Ahead Energy Market and Real-Time Energy Market at a MW amount equal to or greater than its Capacity Supply Obligation whenever the resource is physically available.”); *id.*, § III.13.6.1.5.1 (“A Demand Response Capacity Resource having a Capacity Supply Obligation shall submit Demand Reduction Offers through its Demand Response Resources and submit Supply Offers of any associated Net Supply Generator Assets, into both the Day-Ahead Energy Market and Real-Time Energy Market through its Demand Response Resources and associated Net Supply Generator Assets.”).

by which capacity is provided to the marketplace on an economically efficient basis to meet the actual loads on the New England electric system at each moment in time.”⁴⁶

The Commission has described “[t]he obligation to follow ISO-NE’s dispatch instructions [as], in effect, an obligation to provide energy or reserves subject to the resource’s operating parameters,” and has expressly recognized “New England capacity resources’ energy market obligations as ‘performance’ obligations.”⁴⁷ That linkage between capacity revenues and energy market performance has only been “fortifie[d]” by ISO-NE’s performance incentive modifications to the FCM construct.⁴⁸ This “Pay for Performance” approach is “built around a well-defined product – the delivery of energy and reserves when they are needed most.”⁴⁹ The underlying theory of this approach is that:

A resource that consistently delivers energy and reserves during scarcity conditions contributes greatly to system reliability and should be financially rewarded for that performance. A resource that is unable to deliver energy or reserves during scarcity conditions is less valuable, and should be paid less, regardless of whether it is nominally “available.”⁵⁰

No matter how narrowly the *EPSA* decision is construed, it will prevent Demand Response Capacity Resources from delivering any energy during the 2018/2019 Capacity Commitment

⁴⁶ Motion for Leave to Answer and Answer of ISO New England Inc. at 10, Docket No. ER12-1627-000 (June 1, 2012).

⁴⁷ *ISO New England Inc.*, 147 FERC ¶ 61,172 at P 38 (2014) (footnotes omitted).

⁴⁸ *Id.* at P 39. Cf. PJM, *The Evolution of Demand Response in the PJM Wholesale Market* at 4 (Oct. 6, 2014) (referring to a proposal analogous to ISO-NE’s Pay for Performance approach and stating that “PJM’s unfolding capacity performance initiative more explicitly defines capacity in reference to a resource’s performance in the energy markets, further suggesting that capacity is simply a form of inchoate energy or a call on energy”), available at <http://www.pjm.com/~media/documents/reports/20141007-pjm-whitepaper-on-the-evolution-of-demand-response-in-the-pjm-wholesale-market.ashx>.

⁴⁹ Filings of Performance Incentives Market Rule Changes, Attachment I-1a, Transmittal letter on behalf of the ISO at 2, Docket No. ER14-1050-000 (filed Jan. 17, 2014).

⁵⁰ *Id.* at 13.

Period, and such resources should, therefore, not be entitled to sell capacity or receive any capacity payments for that period.

It would clearly be unjust, unreasonable and unduly discriminatory under Section 206 of the FPA⁵¹ to allow Demand Response Capacity Resources to participate as supply in FCA 9 and subsequent FCM auctions when they cannot lawfully fulfill this core performance obligation. In particular, doing so would unduly discriminate against other capacity resources that participate in such auctions knowing that they will be held to their performance obligations. It will also result in unjust and unreasonable clearing prices that have been depressed by the inclusion of resources that will not be able to provide energy or capacity during the relevant Capacity Commitment Periods.

V.

REQUEST FOR RELIEF

As discussed above, allowing Demand Response Capacity Resources to participate as supply in FCA 9 and future FCM auctions is unlawful and will result in unjust, unreasonable and unduly discriminatory rates. Accordingly, NEPGA respectfully requests that the Commission issue an order on or before January 15, 2015 directing ISO-NE (1) to disqualify all Demand Response Capacity Resources from FCA 9; and (2) to file revisions to the Tariff that will exclude Demand Response Capacity Resources from FCA 9 and all future FCM auctions by the earlier of (a) 30 days following the issuance of the Commission's order on this Complaint, or (b) 10 days prior to the commencement of FCA 9. As discussed below, Commission action on or before January 15, 2015 is essential in order to provide certainty to market participants on this issue and to permit FCA 9 to commence as scheduled.

⁵¹ 16 U.S.C. § 824e (2012).

To be clear, it is no answer to suggest, as some may, that the Commission can kick this can down the road by allowing Demand Response Capacity Resources to participate in FCA 9 and then making up for the capacity shortfall through reconfiguration auctions to be conducted prior to the 2018/2019 Capacity Commitment Period.⁵² The damage to FCA 9 – and to the vast majority of suppliers, whose offers will have cleared in that auction – will already have been done. It is the FCAs, not the reconfiguration auctions, that set the prices received by the vast majority of resources and thereby convey price signals to potential new entrants and existing sellers. The Commission recognized as much in the context of analogous forward capacity auctions conducted by PJM.⁵³ Higher prices in reconfiguration auctions will do nothing to offset the impact on suppliers whose resources cleared in FCA 9. Moreover, shifting potentially significant amounts of capacity from FCA 9 into the more thinly-traded reconfiguration auctions will simply mean that prices in the latter, like the prices in the former, will be distorted.

Taking prompt action in time for FCA 9 will also address an even more fundamental problem by avoiding unnecessary and unproductive litigation regarding the FCA 9 results if Demand Response Capacity Resources are allowed to participate. In this regard, it bears emphasis that post-auction challenges will not be so easily dismissed as might otherwise be the case given that the Commission’s orders allowing Demand Response Capacity Resources to

⁵² Consistent with the jurisdictional line recognized in the *EPSA* decision, NEPGA recognizes that States will presumably move forward with their own retail demand response programs and that to the extent that these programs result in legitimate load reductions, such reductions may be reflected in FCM. The fact that it may be too late for certain States to do so to do so in time for FCA 9 does not empower the Commission to allow the unlawful supply-side participation of Demand Response Capacity Resources in that auction. *Cf. Federal Power Comm’n v. Louisiana Power & Light Co.*, 406 U.S. 621, 635-36 (1972) (“[A] need for federal regulation does not establish [Commission] jurisdiction that Congress has not granted.”).

⁵³ See *Hudson Transmission Partners, LLC v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156 at PP 102-03 (2013).

participate as supply in FCM auctions were, like Order No. 745, “*ultra vires* agency action[s].”⁵⁴

The courts of appeal have long recognized that “[w]here the Commission has committed legal error, . . . ‘the proper remedy’ is to put the parties in the position they would otherwise have occupied.”⁵⁵

VI.

REQUEST FOR FAST TRACK PROCESSING

The issues raised in this Complaint warrant fast track processing under Rule 206(b)(11) of the Commission’s Rules of Practice and Procedure.⁵⁶ Expedited Commission action in advance of FCA 9 is needed to ensure that FCA 9 is conducted in a manner that respects the limits on the Commission’s jurisdiction identified in the *EPSA* decision. Moreover, Commission action on this Complaint on or before January 15, 2015 is required in order to provide the certainty needed for ISO-NE and market participants to make preparations ahead of FCA 9, which is scheduled to commence on February 2, 2015, and to avoid any delays in the scheduled commencement of FCA 9. Unless the Commission grants this Complaint by the date requested, FCA 9 could be delayed and/or the Commission and, in all likelihood, the courts will be faced with an ugly choice between allowing unlawful auction results to stand or ordering re-settlement of FCA 9.

⁵⁴ *EPSA*, 753 F.3d at 225.

⁵⁵ *Panhandle E. Pipe Line Co. v. FERC*, 907 F.2d 185, 189 (D.C. Cir. 1990) (quoting *Office of Consumers’ Counsel v. FERC*, 826 F.2d 1136, 1139 (D.C. Cir. 1987)). See also, e.g., *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (explaining that where the Commission has committed legal error, there is “strong equitable presumption in favor of retroactivity that would make the parties whole”).

⁵⁶ 18 C.F.R. § 385.206(b)(11) (2014).

VII.

OTHER MATTERS

A. Other Proceedings

Pursuant to Rule 206(b)(6) of the Commission's Rules of Practice and Procedure,⁵⁷ NEPGA states that the issues presented in this Complaint are currently not pending before the Commission in any other proceeding.

On November 4, 2014, ISO-NE made an informational filing regarding qualification for FCA 9 in Docket No. ER15-328-000.⁵⁸ That proceeding will provide some opportunity to challenge the qualification of Demand Response Capacity Resources for FCA 9. With the Commission's analysis of FCA qualification filings being "limited to examining whether ISO-NE complied with the Tariff provisions in submitting the Informational Filing" for the FCA in question,⁵⁹ however, that proceeding may not afford a meaningful opportunity for NEPGA and other interested parties to raise issues concerning the lawfulness of the underlying Tariff provisions. Moreover, even if the Commission is willing to entertain such issues in the context of the qualification filing, requests that the Tariff be modified to comply with the *EPSA* decision could be deemed beyond the scope of the qualification proceeding.⁶⁰

In addition, when the D.C. Circuit's mandate to the Commission in the *EPSA* case issues, parties may raise issues concerning the participation of demand response in capacity markets in

⁵⁷ 18 C.F.R. § 385.206(b)(6) (2014).

⁵⁸ See Informational Filing for Qualification in the Forward Capacity Market, Docket No. ER15-328-000 (filed Nov. 4, 2014).

⁵⁹ *ISO New England Inc.*, 146 FERC ¶ 61,014 at P 18 (2014) ("ISO-NE"). See also, e.g., *ISO New England Inc.*, 132 FERC ¶ 61,044 at P 30 (2010) (stating that "the only issue in this proceeding is whether ISO-NE conducted the qualification process for the fourth Forward Capacity Auction in accordance with its FCM Rules").

⁶⁰ See *ISO-NE*, 146 FERC ¶ 61,014 at P 18 ("To the extent NEPGA . . . seeks Tariff changes . . . , those concerns are beyond the scope of this proceeding.").

the Commission's Order No. 745 proceeding (Docket No. RM10-17) and ask that the Commission address such issues in its remand order. The scope and timing of the actual remand order remain to be seen.⁶¹ Given that uncertainty and the urgent need for action in advance of FCA 9, NEPGA has filed this Complaint and urges the Commission to provide guidance specific to FCA 9, even if it intends to examine broader issues about demand response participation in wholesale capacity markets generally on remand.

B. Negotiations Among The Parties

NEPGA has raised its concerns about the participation of Demand Response Capacity Resources in FCA 9 with ISO-NE. Based on those discussions, NEPGA has no reason to believe that ISO-NE will take steps to address this issue unless it is ordered to do so by the Commission. Accordingly, NEPGA does not believe that further informal discussions provide a means of addressing the concerns that have prompted this Complaint in a timely way.

In accordance with Rule 206(b)(9) of the Commission's Rules of Practice and Procedure,⁶² NEPGA states that it has not contacted the Commission's Office of Enforcement before filing this Complaint. This Complaint involves legal issues regarding the Commission's jurisdiction under the FPA that are not suited to resolution by the Office of Enforcement.

⁶¹ Naturally, the Commission is not going to issue an order on remand until the mandate issues in the *EPSA* case. If the government elects to seek *certiorari*, the stay granted on October 20, 2014, *see* October 20 Order, Nos. 11-1486, *et al.*, will continue until the Supreme Court disposes of the case, *see* FED. R. APP. P. 41(d)(2)(B). Importantly, however, delay in the issuance of the mandate in no way diminishes the precedential effect of the *EPSA* decision. To the contrary, the *EPSA* decision has been binding precedent since its release in May 2014, notwithstanding the fact that the mandate has not yet issued. *See Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994) (holding that "once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed"), *vacated on other grounds*, 47 F.3d 1015 (9th Cir. 1995); *Martin v. Singletary*, 965 F.2d 944, 945 & n.1 (11th Cir. 1992) (stating that while the mandate in another case "has not yet issued, it is nonetheless the law in this circuit"); *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring) (explaining that decision becomes "the law of this circuit" upon release and that "[s]tay of the mandate merely delay[s] return to the [lower tribunal]" and "d[oes] not affect the [lower tribunal]'s duty – or ours – to apply the law set forth in [the decision] to parties not involved in the appeal").

⁶² 18 C.F.R. § 385.206(b)(9) (2014).

C. Financial Impact

The effect on clearing prices of including Demand Response Capacity Resources in FCA 9 and subsequent FCM auctions cannot be estimated with any degree of precision, but NEPGA would expect it to be substantial given the amount of Real-Time Demand Response that cleared in past FCAs.⁶³ Allowing Demand Response Capacity Resources to participate as supply in FCA 9 and subsequent FCM auctions will also create significant uncertainty and undermine confidence in FCM by allowing resources that cannot lawfully provide capacity or energy to artificially suppress prices in the auctions by displacing resources that can provide genuine reliability value.

D. Service and Form of Notice

In accordance with Rule 206(c) of the Commission's Rules of Practice and Procedure,⁶⁴ NEPGA is serving a copy of this Complaint on the respondent, ISO-NE.

In accordance with Rule 206(b)(10) of the Commission's Rules of Practice and Procedure,⁶⁵ a form of notice suitable for publication in the Federal Register is provided in Attachment A.

⁶³ ISO-NE, *Forward Capacity Auction #8 Results Summary* (Aug. 14, 2014), available at http://www.iso-ne.com/static-assets/documents/2014/08/fca_8_cso_flow_diagram.pdf.

⁶⁴ 18 C.F.R. § 385.206(c) (2014).

⁶⁵ 18 C.F.R. § 385.206(b)(10) (2014).

VIII.

CONCLUSION

WHEREFORE, NEPGA respectfully requests that the Commission issue an order on or before January 15, 2015 directing ISO-NE (1) to disqualify all Demand Response Capacity Resources from FCA 9; and (2) to file revisions to the Tariff that will exclude Demand Response Capacity Resources from FCA 9 and all future FCM auctions by the earlier of (a) 30 days following the issuance of the Commission's order on this Complaint, or (b) 10 days prior to the commencement of FCA 9.

Respectfully submitted,

**NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC.**

By: _____ /s/
David G. Tewksbury
Stephanie S. Lim
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Dan Dolan
Bruce F. Anderson
NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC.
141 Tremont St.
Boston, MA 02111

On behalf of the **New England
Power Generators Association, Inc.**

Dated: November 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on the respondent,
ISO New England Inc.

Dated at Washington DC, this 14th day of November, 2014.

/s/
Stephanie S. Lim

Attachment A

Form of Notice

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

New England Power Generators)
Association, Inc.,)
)
Complainant,)
)
v.) **Docket No. EL15-_____000**
)
ISO New England Inc.,)
)
Respondent.)

NOTICE OF COMPLAINT

(November __, 2014)

Take notice that on November 14, 2014, the New England Power Generators Association, Inc. (NEPGA) filed a formal complaint against ISO New England Inc. (ISO-NE) pursuant to Sections 206 and 306 of the Federal Power Act. NEPGA respectfully requests that the Commission issue an order on or before January 15, 2015 directing ISO-NE (1) to disqualify all Demand Response Capacity Resources from the ninth Forward Capacity Auction; and (2) to file revisions to its Transmission, Markets & Services Tariff that will exclude Demand Response Capacity Resources from the ninth Forward Capacity Auction and all future Forward Capacity Market auctions.

NEPGA certifies that copies of the complaint were served on the contacts for ISO-NE, as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, D.C. There is

an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose
Secretary